BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2000-527-C - ORDER NO. 2001-147

FEBRUARY 15, 2001

IN RE: Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252.	))))))	ORDER RULING ON PETITIONS FOR REHEARING AND RECONSIDERATION

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Petitions for Rehearing and/or Reconsideration filed by AT&T of the Southern States, Inc. ("AT&T") and BellSouth Telecommunications, Inc. ("BellSouth").[1] Both AT&T's Petition and BellSouth's Motion seek review of issues from Commission Order No. 2001-79. In Order No. 2001-79, dated January 30, 2001, this Commission issued its decision on issues presented by the Petition of AT&T for arbitration of certain terms and conditions of a proposed interconnection agreement by and between AT&T and BellSouth. The Petition was filed pursuant to the provisions of Section 252 of the Telecommunications Act of 1996 ("1996 Act.") Order No. 2001-79

[1] AT&T's filing is entitled "Petition on Behalf of AT&T Communications of the Southern States, Inc. for Rehearing or Reconsideration." (hereafter referred to as "Petition") BellSouth's filing is entitled "BellSouth's Motion for Reconsideration and/or Rehearing of Commission Order No. 2001-079." (hereafter referred to as "Motion").

addresses the remaining open issues between AT&T and BellSouth concerning the interconnection agreement between the parties.[2]

In Order No. 2001-79, the Commission ruled on the open issues as follows:

1. ISP-bound traffic is non-local interstate traffic and is therefore not subject to reciprocal compensation. Accordingly, BellSouth's proposed contract language is appropriate and shall be included in the Interconnection Agreement. [Issue 1]

2. AT&T is not subject to termination penalties for converting special access purchased under tariffed services pursuant to contracts for network elements. Accordingly, AT&T's proposed contract language on this issue shall be included in the Interconnection Agreement. [Issue 6]

3. AT&T is entitled to a single Point of Interconnection in a LATA, however, AT&T shall remain responsible for paying for the facilities necessary to carry calls to the single Point of Interconnection. Accordingly, the language proposed by BellSouth with regard to this issue shall be included in the Interconnection Agreement. [Issue 7]

4. To qualify for tandem switching rate, an AT&T switch must serve a geographic area comparable to the geographic area served by BellSouth's tandems and must perform the function of a tandem switch for local transfer. Based on the discussion above related to this issue, the Commission approves the language proposed by BellSouth for inclusion in the Interconnection Agreement. [Issue 9]

5. This Order is enforceable against AT&T and BellSouth. BellSouth affiliates which are not incumbent local exchange carriers are not bound by this Order. Similarly, AT&T affiliates are not bound by this Order. This Commission cannot force contractual terms upon a BellSouth or AT&T affiliate which is not bound by the 1996 Act.

Order 2001-79, p. 35.

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[2] AT&T filed the Petition for Arbitration requesting the Commission to resolve a number of outstanding issues with BellSouth arising from negotiation between the parties of an interconnection agreement. The Petition set forth twenty-six unresolved issues. Through negotiations, the parties agreed to the disposition of all but four issues. Thus at the time of the hearing in this matter, only four issues remained for arbitration.

By its Petition, AT&T seeks rehearing or reconsideration of the Commission's ruling in Issues, 1, 7, and 9. BellSouth, by its Motion, requests rehearing or reconsideration on Issue 6.

II. AT&T'S PETITION FOR REHEARING OR RECONSIDERATION

A. Issue 1: Should calls to internet service providers (ISPs) be treated as local traffic for purposes of reciprocal compensation?

AT&T asserts that the Commission incorrectly found that traffic transiting an ISP is interstate non-local traffic that is not subject to reciprocal compensation. AT&T asserts that the Commission erred in its decision because the Commission

(1) did not mention nor discuss a recent D.C. Circuit Court of Appeals ruling to vacate and remand the FCC's ISP Declaratory Ruling;
(2) relied on its prior October 4, 1999, ITC^DeltaCom Order that pre-dates the D.C. Circuit Court of Appeals decision;
(3) failed to consider more recent arbitration orders and case precedent; and
(4) ignored the true intent of §251 and §252 of the Telecommunications Act.

Petition of AT&T, p. 3.

Discussion:

On February 25, 1999, the FCC adopted its "Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68." ("*ISP Declaratory Ruling*") In the *ISP Declaratory Ruling*, the FCC stated that for jurisdictional purposes, ISP-bound traffic should be analyzed on an end-to-end basis, rather than by breaking the traffic into component parts. The FCC stated "that the communications at issue do not terminate at the ISP's local server... but continue on to the ultimate destination or

destinations, specifically at a[n] Internet website that is often located in another state."[3] The FCC noted that it had previously distinguished between the "telecommunications component" and the "information services component" of end-to-end Internet access for purposes of determining which entities are required to contribute to universal service.[4] The FCC also stated that it had previously "concluded that ISPs do not appear to offer 'telecommunications service' and thus are not 'telecommunications carriers' ... it has never found that 'telecommunications' end where 'enhanced' service begins.[5] The FCC found in the *ISP Declaratory Ruling* that while ISP-bound traffic is jurisdictionally mixed, it appears to be largely interstate.[6] The FCC rejected the two-component theory for calls to ISPs, applied a one-communication theory, and found that the traffic in question was jurisdictionally interstate. However, the FCC did not decide whether reciprocal compensation would be due in any particular circumstance. Specifically, the FCC concluded that parties could voluntarily agree to reciprocal compensation, or a state regulatory body could impose such payment obligations on carriers in arbitrating interconnection agreement disputes under Section 252 of the 1996 Act.[7] That is, regardless of how ISP traffic is categorized for jurisdictional purposes, the FCC did not intend to preempt a state commission in deciding the compensation issue for ISP-bound traffic. In fact the FCC concluded in the *ISP Declaratory Ruling* that until adoption of a final rule,

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[3] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, rel. February 26, 1999, ¶ 12 (hereafter referred to as "*ISP Declaratory Ruling*").
[4] *ISP Declaratory Ruling*, ¶ 13.
[5] *Id.*
[6] *Id.* at ¶ 18.
[7] *Id.* at ¶ ¶ 21-23, 25.

state commissions will continue to determine whether reciprocal compensation is due for this traffic.[8]

On March 24, 2000, the United State Court of Appeals for District of Columbia Circuit vacated the FCC's declaratory ruling and remanded the matter to the FCC.[9] The D.C. Court of Appeals held that the FCC had failed to adequately explain why its end-to-end analysis, which had traditionally been used in jurisdictional determinations, was also applicable in determining whether reciprocal compensation was due for termination of ISP calls. In vacating the ruling and remanding the case to the FCC, the D.C. Court of Appeals stated "the [FCC] has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] … local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service."[10] As of this date, the FCC has yet to issue a further ruling on the ISP/reciprocal compensation issue.

Despite the D.C. Court of Appeals vacating the *ISP Declaratory Ruling* and the failure of the FCC to issue a further ruling, this Commission has the authority to determine the compensation rate for ISP-bound traffic. The D.C. Court of Appeals, in *Bell Atlantic*, vacated the FCC's holding that ISP-bound traffic is not local, but interstate in nature, and ruled that the FCC failed to satisfactorily explain its reasons. Although the court vacated the *ISP Declaratory Ruling* to the extent it found ISP calls to be interstate in nature, the court did not address the FCC's holding that state commissions are authorized to

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[8] *Id.* at ¶ 25.
[9] *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1, (D.C. Cir. March 24, 2000).
[10] *Id.* at 336.

determine the intercarrier compensation mechanism for such traffic in arbitration proceedings.

In the Order No. 1999-690 (dated October 4, 1999), "Order on Arbitration," Docket No. 1999-259-C (In Re: Petition of ITC^DeltaCom Communications, Inc. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996), this Commission determined that ISP-bound traffic is non-local interstate traffic which is not subject to the reciprocal compensation obligations of the 1996 Act. In reaching its conclusion, this Commission recognized the decision of the FCC in its *ISP Declaratory Ruling*. The Commission also recognized that "[t]he FCC in its [*ISP*] *Declaratory Ruling* concluded that ISP-bound traffic is non-local interstate traffic and clearly left the determination of whether to impose reciprocal compensation obligations in an arbitration proceeding to the state commission."[11] The Commission then analyzed the traffic in question and concluded

> [w]hile it may be true that ISP-bound traffic travels similar paths across the same facilities as local calls to residential customers as advanced by ITC^DeltaCom, it is also clear that ISP-bound calls do not terminate at the ISP. In the example given by witness Starkey for ITC^DeltaCom, the local call to the residential customer clearly terminates on the ITC^DeltaCom network. ISP-bound traffic, on the other hand, does not terminate at the ISP's server but continues to the ultimate Internet destination which is often located in another state. As ISP-bound traffic does not terminate at the ISP's server on the local network, this Commission finds that ISP-bound traffic in non-local traffic. Further, since Section 251 of the 1996 Act requires that reciprocal compensation be paid for local traffic, the Commission further finds that the 1996 Act imposes no obligation on parties to pay reciprocal compensation for ISP-bound traffic.
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> Order No. 1999-690, p.64.

[11] Order No. 1999-690, p. 64.

AT&T advocates reciprocal compensation for ISP-bound traffic and proposes that local calls should be provided on a "caller pays" basis by the local exchange carrier on whose network the call originates.[12] By "caller pays" AT&T means that the customer who originates the call pays his or her local carrier to get the call from the point of origin all the way to its intended destination on the public switched telephone network ("PSTN").[13] According to AT&T, the financial responsibility for terminating calls does not vary depending on the nature of the customer called, and the financial responsibility should be the same regardless of the nature of the called party.[14]

AT&T also asserts that if ISP-bound traffic is not treated as local traffic that it will be unable to recover costs incurred to handle calls originated by BellSouth customers.[15] AT&T further maintains that the competitive market in South Carolina will be damaged if the Commission finds that ISP-bound traffic is not local traffic.[16]

On the other hand, BellSouth opposes the payment of reciprocal compensation for ISP-bound traffic and argues that ISP-bound traffic is not local but analogous to long distance access service. BellSouth asserts that ISP-bound traffic constitutes access service that is subject to interstate jurisdiction and is not local traffic.[17] BellSouth maintains that the reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act apply

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[12] Prefiled Direct Testimony of Gregory R. Follensbee, p.7, 18-10 (hereafter referred to as "Follensbee Direct").
[13] Follensbee Direct, p. 7, ll. 10-13.
[14] Follensbee Direct, p. 8, l.21 – p. 9, l.2.
[15] Prefiled Rebuttal Testimony of Gregory R. Follensbee, p. 2, ll. 14-17 (hereafter referred to as "Follensbee Rebuttal").
[16] Follensbee Rebuttal, p. 2, ll. 20-22.
[17] Prefiled Direct Testimony of John A. Ruscilli, p. 3, ll 21-23 (hereafter referred to as "Ruscilli Direct").

only to local traffic and are therefore inapplicable to ISP-bound traffic.[18] BellSouth contends that an end user subscribing to Internet service is just like an end user subscribing to long distance service. According to BellSouth, the end user must presubscribe to the Internet service just as with long distance service.[19] The ISP collects access traffic over facilities it leases from a LEC just like a long distance company does.[20] As with long distance service, a subscriber to Internet service pays a local carrier for local exchange service and also pays an ISP for Internet service, just like he pays for long distance service, although the ISP service may be flat-rated rather than usage-based as are toll rates.[21] The only difference is that, unlike the IXC, the ISP does not pay access charges for originating traffic that the LEC is helping carry from the ISP's customer to the ISP's location where the call goes out to the Internet.[22]

BellSouth maintains that when a customer accesses the Internet through an ISP who is a customer of a competing carrier, the only party not being compensated for the costs it incurs is BellSouth.[23] With a typical long distance call, BellSouth asserts that the long distance carrier would pay originating switched access. However, with the call to the ISP, the ISP only pays its local service provider for the service its receives. BellSouth as the originating carrier does not receive any compensation for this call even though it incurs costs on behalf of the ISP.[24] According to BellSouth, if ISPs had not been

[18] Ruscilli Direct, p. 3, ll. 18-24.
[19] Ruscilli Direct, p. 5, ll. 4-6.
[20] Ruscilli Direct, p. 5, ll. 6-8.
[21] Ruscilli Direct, p. 5, ll. 8-14.
[22] Ruscilli Direct, p. 5, ll.14-16.
[23] Ruscilli Direct, p. 5, ll. 18-20.
[24] Ruscilli Direct, p. 5, ll. 23-24.

exempted by the FCC from paying access charges for access service, BellSouth would receive originating access from the ISP just as it would with a long distance call.[25]

BellSouth also maintains that paying reciprocal compensation for ISP-bound traffic results in a windfall for CLECs as the amounts being billed by CLECs to ILECs do not represent revenues that CLECs have earned as a result of providing local service nor do these amounts represent cost recovery for completing local calls originated by BellSouth's end users.[26] BellSouth further alleges that if reciprocal compensation were due on ISP-bound traffic, any incentive that CLECs may have to serve residential customers would be lessened and would provide incentive for CLECs to primarily serve ISPs.[27]

During the arbitration hearing, AT&T witness Follensbee admitted that a call to an ISP provider does not terminate at the ISP provider's office but terminates when it reaches the destination on the Internet. In fact, Mr. Follensbee stated that AT&T is one of the rare CLECs because that actually agrees with BellSouth that the calls are jurisdictionally interstate. According to Mr. Follensbee, AT&T seeks compensation for this traffic because in the absence of the FCC deciding on a compensation mechanism for this traffic, the states are left to decide the issue if the traffic is local or not local. In response to further questioning by the Commission, Mr. Follensbee acknowledged that no records exist from which the telecommunications providers can determine where the calls to the Internet terminate.

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[25] Ruscilli Direct, p. 6, ll. 1-3.
[26] Ruscilli Direct, p. 6, ll. 18-22.
[27] Ruscilli Surrebuttal, p. 4, l.19 – p. 5, l.2.

Based on the record before this Commission, this Commission determines that ISP-bound traffic is non-local traffic. AT&T has admitted that the calls to the Internet do not terminate at the ISP provider's office but in fact terminate at the modem of the web-address. As the call does not terminate at the ISP provider's office, then the call is in most cases not a local call. While some calls to the Internet may be local to the calling party, most calls to the Internet will not be local calls. In fact a significant number of calls will be out-of-state or even international calls. The fact remains however, that there are no records that can be used to determine where the calls terminate on the Internet. But the record before this Commission establishes that the calls do not terminate at the ISP provider's office but terminate on the Internet at some undisclosed location.

Thus the Commission finds that BellSouth's analogy of the ILEC-IXC interconnection for the purpose of transmitting an interstate call is the more reasonable approach to take. Given that most Internet calls terminate at locations out of state, it is apparent that these calls are interstate in nature, which is a fact that AT&T concedes.[28] The originator of the Internet-bound call acts primarily as a customer of the ISP, not as a customer of BellSouth. Both BellSouth and AT&T are providing access-like functions to transmit the call to the Internet, very much like their role in providing access to an IXC to transmit an interstate call. While this analogy suggests that the ISP should compensate both BellSouth and AT&T for the costs they incur in transmitting the call, this option is

[28] AT&T witness Follensbee admitted upon questioning that AT&T agrees that the call is interstate.

precluded by the FCC's access charge exemption for ISPs.[29] However, this analogy does aptly illustrate the interstate, rather than local, nature of the ISP-bound traffic.

AT&T also alleges error by the Commission in failing to consider a recent decision of the Tenth Circuit Court of Appeals which affirmed the Oklahoma Corporate Commission's ("OCC") determination, and an Oklahoma federal district court's affirmation of the OCC's ruling, requiring reciprocal compensation for calls to ISPs. *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493 (10th Cir. Dec. 13, 2000). The *Brooks Fiber* case is distinguishable from the case before the Commission. The *Brooks Fiber* case concerned the interpretation of an existing interconnection agreement. The OCC was called upon to interpret whether the existing interconnection agreement between Brooks Fiber and Southwestern Bell required the payment of reciprocal compensation for ISP-bound traffic. The OCC concluded that the interconnection agreement required the payment of reciprocal compensation for ISP-bound traffic, and the decision was ultimately affirmed by the federal district court and the Tenth Circuit Court of Appeals.

As opposed to interpreting the language of an existing agreement, this Commission is asked to decide whether language requiring reciprocal compensation payments for ISP-bound traffic should be included in an interconnection agreement to be executed by the parties. Based upon the record before it, this Commission has concluded that ISP-bound traffic is non-local traffic. As non-local traffic, the ISP-bound traffic is not

[29] *See, e.g.* MTS/WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682 (1983); Amendments of part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) ("*ESP Exemption Order*").

subject to reciprocal compensation. Therefore, the Commission has properly concluded that the new interconnection agreement should contain explicit language that exempts ISP-bound traffic from reciprocal compensation obligations.

AT&T also alleges error by the Commission in failing to consider decisions by regional state commissions regarding this issue. This Commission is aware that it is in the minority of state commissions in determining that ISP-bound traffic should not be subject to reciprocal compensation obligations. However, this Commission is likewise aware that other state commission decisions have no binding or precedential effect on the decisions of this Commission. While it may be helpful to look to other state commission decisions for guidance, decisions from other state commissions have no preclusive or precedential value. In fact, the Commission cited to several state commissions' decisions in Order No. 2001-79. However, the Commission noted in citing those decisions that "while the Commission is aware that many states have found reciprocal compensation due on ISP traffic, the Commission's[30] decision is consistent with other commissions which have considered this issue." The Commission discerns no error in not addressing other state commission decisions holding that reciprocal compensation should be paid for ISP-bound traffic.

Finally, AT&T argues that the Commission's decision in Order No. 2001-79 contradicts Sections 251 and 252 of the 1996 Act. AT&T asserts that reciprocal compensation for ISP-bound traffic that both originates and terminates within the same local calling area is required as a consequence of Sections 251 and 252 of the 1996 Act.

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[30] Order No. 2001-79, p. 7.

The fallacy with AT&T's argument is that the Commission has determined that the traffic in question does not terminate within the same local calling area. As discussed above, the Commission found, based in part upon the testimony presented by AT&T, that ISP-bound traffic is not local traffic because the traffic does not terminate at the ISP provider's office but terminates at the modem of the party out on the Internet. As the ISP-bound traffic is not local traffic, the reciprocal compensation provision of Section 251(b)(5) does not apply to that traffic.

Additionally, the Commission recognizes certain policy concerns regarding this issue. While this issue is decided upon the record that clearly reveals both parties' belief that ISP-bound traffic is jurisdictionally interstate, there exist important policy considerations that must be noted. In our opinion, reciprocal compensation for ISP-bound traffic offers disincentives for CLECs to expand service to residential customers. As stated by Mr. Ruscilli in his testimony, the allowance of reciprocal compensation for ISP-bound traffic would lessen incentives for CLECs to serve residential customers and provide incentives for CLECs to primarily serve ISPs.[31] This Commission can discern no reasonable basis how the payment of reciprocal compensation for ISP-bound traffic advances the goals of the 1996 Act in promoting competition in the local telecommunications market. Payment of reciprocal compensation for ISP-bound traffic results in transferring dollars from one carrier to another without promoting competition of local phone services and results in non-users of Internet services subsidizing those who use the Internet.

[31] Ruscilli Surrebuttal, p. 5, ll. 1-2.

Based on the reasoning discussed above, the Commission finds that it properly concluded in Order No. 2001-79 that ISP-bound traffic is non-local traffic that is not subject to reciprocal compensation. Accordingly, the Commission denies AT&T's Petition on this issue.

B. Issue 7: How should AT&T and BellSouth interconnect their networks in order to originate and complete calls to end-users?

AT&T alleges error on the part of the Commission in requiring AT&T to bear the financial responsibility for transporting BellSouth originated calls to the point of interconnection ("POI"). AT&T asserts that the Commission failed to consider relevant law and misinterpreted applicable law. Thus AT&T requests that the Commission reconsider or rehear its ruling that AT&T must be financially responsible for transporting calls to the POI. Specifically, AT&T asserts that the Commission

(1) failed to consider that the FCC endorsed AT&T's position on this issue in its recent SBC 271 Kansas and Oklahoma Order;
(2) failed to consider the Georgia Public Service Commission's Staff recommendation in the MCI-WorldCom/BellSouth arbitration;
(3) erroneously interpreted existing law which clearly requires that each carrier originating a call must bear financial responsibility for delivering that call to the terminating carrier's network; and
(4) fails to recognize that AT&T's legal right to establish a single POI supports the proposal that each party is financially responsible for transporting its own originating traffic.

Discussion:

This issue addresses calls that originate in one BellSouth local calling area and are intended to be terminated in that same local calling area but that have to be routed out of that local calling area due to AT&T's network design. BellSouth proposed that AT&T

should be responsible for the costs BellSouth incurs in hauling these calls outside the local calling area in which they originate to a Point of Interconnection ("POI") that AT&T has designated in a distant local calling area. AT&T asserted that BellSouth should be responsible for these costs. In Order No. 2001-79, the Commission found that "AT&T can have a single POI in a LATA if it chooses, [but AT&T] should be responsible to pay for the facilities necessary to carry calls from distant local calling areas to that single POI."[32]

AT&T claims that the recent FCC Order on the application of SBC Communications, Inc. to provide interLATA services in Kansas and Oklahoma[33] directly addresses the issue of a single POI and the financial responsibility for transporting calls to that single POI. AT&T further alleges that the *SWBT Kansas/Oklahoma Order* provides "specific and unequivocal direction ... that the BellSouth proposal is illegal under FCC rules."[34]

In reviewing an application under Section 271 of the 1996 Act, the FCC reviews the application under a competitive checklist that incorporates the local competition obligations imposed on incumbent LECs by Sections 251 and 252 of the 1996 Act. The *SWBT Kansas/Oklahoma Order* is the FCC's order issued after reviewing SBC's application in light of the competitive checklist.

In addressing technically feasible points of interconnection in the *SWBT Kansas/Oklahoma Order*, the FCC concluded "that SWBT provides interconnection at all

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[32] Order No. 2001-79 at 28.
[33] Memorandum Opinion and Order, FCC 01-29, Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217 (January 22, 2001)("*SWBT Kansas/Oklahoma Order*").
[34] Petition of AT&T, p. 13.

technically feasible points, including a single point of interconnection, and therefore demonstrates compliance with the checklist item."[35] The FCC also stated that "SWBT further shows that, for purposes of interconnection to exchange local traffic, a competitive LEC may choose a single, technically feasible point of interconnection within a LATA."[36] In that proceeding, AT&T and others argued that SWBT denied competing carriers the right to select a single POI by improperly shifting to competing carriers inflated transport and switching costs associated with the single POI. The FCC declined to decide any dispute related to the issue because the interconnection issues raised were hypothetical ones advanced in a technical conference and the FCC's review is limited to present issues of compliance.[37]

AT&T's argument to this Commission is based on dictum from the *SWBT Kansas/Oklahoma Order*. In the 271 proceeding, SWBT argued that the FCC had previously determined in the *SWBT Texas Order*[38] that carriers seeking a single POI must bear the additional cost associated with that arrangement. In a rebuke of SWBT's argument, the FCC stated that, in the *SWBT Texas Order,* it had cited SWBT's interconnection agreement with MCI-WorldCom in support of the proposition that SWBT provided carriers with the option of a single POI. However, the FCC clarified that it had not considered how the choice of a single POI would affect inter-carrier compensation

[35] *SWBT Kansas/Oklahoma Order* at ¶232.
[36] *Id.*
[37] *SWBT Kansas/Oklahoma Order* at ¶234.
[38] Memorandum Opinion and Order, FCC 00-238, Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65 (June 30, 2000)("*SWBT Texas Order*").

arrangements nor did its decision to allow a single POI change an incumbent LECs reciprocal compensation obligations.[39]

Contrary to AT&T's assertion that the *SWBT Kansas/Oklahoma Order* provides "unequivocal direction" regarding this issue, this Commission believes that the *SWBT Kansas/Oklahoma Order* did not rule on the present issue. If anything, the *SWBT Kansas/Oklahoma Order* reinforces this Commission's view that the present issue has not been resolved by any FCC order or rule.[40] In the *SWBT Kansas/Oklahoma Order*, the FCC stated that the *SWBT Texas Order* did not change an incumbent LEC's reciprocal compensation obligation. However, the issue presently before this Commission is an interconnection issue, not a reciprocal compensation issue.[41] The FCC has recognized that a competing carrier such as AT&T has no right to avoid the financial consequences of its chosen "'technically feasible' but expensive interconnection."[42]

AT&T asserts that the effect of the Commission's decision fails to recognize AT&T's right to establish a single POI in a LATA. According to AT&T, the Commission's decision would require AT&T to construct a point of interconnection in each BellSouth local calling area. This contention is inaccurate. The Commission in Order No. 2001-79 acknowledges that AT&T can establish a physical POI at any technically feasible point and further that AT&T can choose to have only a single POI in a LATA.[43]

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[39] *SWBT Kansas/Oklahoma Order* at ¶235.
[40] Order No. 2001-79, p. 20.
[41] At the hearing before the Commission, both AT&T witness Follensbee and BellSouth witness Ruscilli confirmed that this issue is an interconnection, not a reciprocal compensation, issue.
[42] "[A] requesting carrier that wishes a 'technically feasible' but expensive interconnection would pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit." *Local Competition Order*, ¶ 199.
[43] Order No. 2001-79, p. 20.

Further, the Commission recognizes AT&T's ability to design its network. However, in Order No. 2001-79, the Commission recognized that it would not be fair or equitable to permit AT&T to avoid the costs that result from AT&T's network design by requiring BellSouth to bear those costs.[44]

In *US West v. Jennings,* 46 F.Supp.2d 1004 (D. Az. 1999) the United States District Court for the District of Arizona reviewed the Arizona Corporation Commission's decisions on the Point of Interconnection issue in ten consolidated arbitration cases. The Arizona Commission acknowledged that in at least one of those ten proceedings, it had considered "only whether interconnection was physically possible at the requested location."[45] The Arizona Commission "ignored other factors such as the cost to [the incumbent] of establishing only a single point of interconnection, because the [commission] assumed it could not consider those factors."[46] The Court however ruled that

> In determining whether a CLEC should establish more than one point of interconnection in Arizona, the [Arizona Commission] may properly consider relevant factors, including whether a CLEC is purposely structuring its point(s) of interconnection to maximize the cost to the ILEC or to otherwise gain an unfair competitive advantage. The purpose of the [1996 Act] is to promote competition, not to favor one class of competitors at the expense of another.
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> 46 F.Supp.2d at 1021.

The Arizona district court further ruled that "[a]s an alternative, the [Arizona Commission] may require a CLEC to compensate [the incumbent] for costs resulting from

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[44] Order No. 2000-79, p. 24.
[45] *US West v. Jennings*, 46 F. Supp.2d 1004, 1021 (D. Az. 1999).
[46] *Id.*

an inefficient interconnection."[47] The district court concluded its discussion of the issue by noting that "[i]t would be ironic if a law designed to promote a market-driven economy in local telephone service were instead interpreted to prohibit the consideration of cost when making decisions and thereby subsidize and reward inefficient behavior by market participants."[48]

The Commission's decision in Order No. 2001-79 does not, as asserted by AT&T, force AT&T to construct a POI in each BellSouth local calling area. While AT&T may choose to provision its own facilities, other options are available. For instance, AT&T may lease facilities from BellSouth, or from any other entity, to collect traffic from the local calling areas outside of the local calling area in which AT&T's POI is located. Moreover, AT&T does not have to place facilities in local calling areas where it does not plan to serve customers. Nothing in the Commission's decision requires AT&T to build facilities beyond that required to establish a single POI in the LATAs AT&T chooses to serve. The Commission's decision does, however, require AT&T to be financially responsible for the design of AT&T's network and not to shift costs from that design to the incumbent LEC.

AT&T also alleges error by the Commission in not considering the recommendation of the Georgia Public Service Commission Staff in an arbitration proceeding involving MCI-WorldCom and BellSouth. AT&T asserts that "the Georgia Public Staff recommended that the [Georgia PSC] find 'that MCI WorldCom's right to

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[47] *Id.*
[48] *Id.* at 1022.

designate the network point or points of interconnection and the financial responsibilities to any technically feasible point is unequivocal under the [1996 Act] and the FCC's local Competition Order.'"[49] Further, AT&T advises that the Georgia Public Staff recommended that the Georgia PSC find that "[e]ach party is responsible for bringing its originating traffic to the Point of Interconnection and each party is responsible for transporting and terminating the other party's traffic from the point of interconnection."[50]

As noted in the Commission's discussion of the previous issue, decisions from other state commission have no binding or precedential effect on the decisions of this Commission. While it may be helpful to look to other state commission decisions for guidance, decisions from other state commissions have no preclusive or precedential value. Further, AT&T commends to this Commission a position of the Georgia Public Staff, not a decision by the Georgia PSC. That information is due no more weight than the argument of a party to a proceeding. Thus the Commission discerns no error in not considering the position from the staff of another state commission.[51]

AT&T argues that the Commission misinterpreted FCC regulations and incorrectly interpreted case law. According to AT&T, the Commission's analysis of *TSR*

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[49] Petition of AT&T, p. 16.

[50] *Id.*

[51] The Commission is also aware that the North Carolina Public Staff's recommendation on this issue in the arbitration proceeding between AT&T and BellSouth before the North Carolina Public Service Commission is the opposite of the recommendation of the Georgia Public Staff. In its recommendation the North Carolina Public Staff stated "[i]t is the Public Staff's position that BellSouth should not be required to be financially responsible for a significant portion of AT&T's local exchange network." Further, the North Carolina Public Staff recommended "that if AT&T interconnects at points within a LATA but outside of BellSouth's local calling area, AT&T be required to compensate BellSouth for, or otherwise be responsible for, the transport beyond the local calling area. The Public Staff does not believe that such a holding would violate any FCC rules or case law. Moreover, such a result would be equitable and in the public interest." Response of BellSouth Telecommunications, Inc. to AT&T Communications of the Southern States, Inc.'s Petition for Rehearing or Reconsideration, pp. 11-12.

Wireless, LLC, et al., v. US West[52] is flawed. AT&T submits that *TRS Wireless* supports its position that BellSouth cannot charge AT&T for the cost of any traffic that originates and terminates in the same LATA. AT&T asserts that BellSouth is prohibited from charging AT&T for any traffic that originates on the BellSouth network and is terminated anywhere in the same LATA in which the traffic originated.

In *TRS Wireless*, a Commercial Mobile Radio Service ("CMRS") provider took the position that an incumbent LEC was required to deliver originating traffic to the CMRS provider's POI without charge. The FCC noted that two rules bear on this position. The first is 47 C.F.R. § 51.703(b), which provides that "a LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." The second rule is 47 C.F.R.§ 51.701(b)(2), which defines "local telecommunications traffic" to which reciprocal compensation obligations apply as "telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area ... ."

In *TRS Wireless*, the FCC read these two rules together to determine the extent of an incumbent's obligation to deliver its originating traffic to a CMRS provider without charge. Specifically, the FCC ruled that "Section 51.703(b), when read in conjunction with section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated."[53] An incumbent, therefore, is required to deliver its originating traffic, without charge, to a CMRS

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[52] *TRS Wireless, et al., v. US West,* Memorandum Opinion and Order, FCC 00-194, In the Matters of TRS Wireless, LLC, et al., Complainants, v. US West Communications, Inc. et al., Defendants. (File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18) (Rel. June 21, 2000)("*TRS Wireless*").

[53] *TRS Wireless* Order at ¶ 31.

provider's POI located in the same MTA in which the traffic originates. However, nothing in *TRS Wireless* suggests that an incumbent LEC is required to deliver its originating traffic, without charge, to a POI located in the MTA other than the MTA in which the traffic originated.

In Order No. 2001-97, the Commission used the rationale of *TRS Wireless* to conclude that BellSouth should not be required to deliver local traffic free of charge to points outside the local calling area where the call originates.[54] The Commission believes that the logic of the *TRS Wireless* decision applies with equal force to traffic between two LECs. The definition of "local telecommunications traffic" for LEC-to-LEC calls is traffic "that originates and terminates within a local service area established by the state commission."[55] While a MTA determines a local calling area in the CMRS environment, a local service area established by a state commission determines a local calling area in the wire-line or non-CMRS environment. Applying the logic of the FCC's *TRS Wireless* decision to the LEC-to-LEC traffic that is at issue in this arbitration leads to the conclusion that BellSouth must deliver its originating traffic, without charge, to an AT&T POI that is located anywhere within the local calling area in which the traffic originated. Likewise, BellSouth is not required to deliver, without charge, traffic that originates in one local calling area to a POI in another local calling area.

AT&T argues that "local telecommunications traffic" as contemplated by the FCC rules is not limited to traffic that originates and terminates in a basic local calling area but

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[54] Order No. 2001-79, p. 26.
[55] 47 C.F.R. § 51.701(b)(1).

rather includes a much broader scope, including any local calling area approved by the state commission. AT&T's argument is based on the premise that the Commission has approved local calling areas that include entire LATAs.

For the Commission to adopt AT&T's argument would allow AT&T to change the local calling areas approved by the Commission for BellSouth. While AT&T may determine, subject to Commission approval, its own local calling area, AT&T may not force its idea of a local calling area upon BellSouth. While BellSouth provides LATA-wide calling, it does so under an "area calling plan" known as "Area Plus."[56] BellSouth's Area Plus provides a subscriber with LATA-wide local calling; however, the subscriber pays for the ability to make LATA wide calls.[57]

In the *Local Competition Order*, the FCC stated that a CLEC must bear the additional costs caused by the CLEC's choice of interconnection. The FCC stated that "a requesting carrier that wishes a 'technically feasible' but expensive interconnection would pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit."[58] Further at paragraph 209 of the *Local Competition Order*, the FCC states that "Section 252(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LECs network at which they wish to deliver traffic. Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs

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[56] In response to questions at the arbitration proceeding, BellSouth witness Ruscilli testified that customers may purchase area calling plans. The Commission notes that BellSouth's area calling plan is marketed as "Area Plus."

[57] Oral testimony of Ruscilli.

[58] *Local Competition Order* at ¶ 199.

incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect."[59]

The record reveals that AT&T's choice of interconnection and network design results in additional costs that AT&T contends BellSouth must bear. However, the costs are costs that BellSouth would not normally incur in the provision of local exchange service. For instance, BellSouth witness Ruscilli testified that when a BellSouth customer in a local calling area calls another BellSouth customer in the same local calling area, the call would not leave the local calling area. Similarly, when a BellSouth customer calls an AT&T customer in the local calling area where the AT&T POI is located, the call never leaves the local calling area. But under AT&T's network design, when a BellSouth customer in a local calling area calls an AT&T customer in the same local calling area but in a different local calling area than where the AT&T POI is located, BellSouth incurs additional cost to complete the call due to the necessity to haul the call outside the local calling area to the local calling area where AT&T's POI is located. While the location of the POI is technically feasible, the interconnection creates additional costs which this Commission believes should be born by AT&T. AT&T's network design creates these additional costs that, pursuant to Section 252(d)(1) of the 1996 Act, should be born by AT&T.

Accordingly, the Commission finds AT&T's asserted grounds for reconsideration without merit and hereby denies AT&T's Petition as to this issue.

C. Issue 9: Should AT&T be permitted to charge tandem rate elements when its switch serves a geographic area comparable to that served by BellSouth's tandem

[59] *Id.* at ¶ 209.

switch?

AT&T asserts the Commission incorrectly held that AT&T must meet a two-pronged test before it can charge tandem rates for the use of AT&T's switches. In Order No. 2001-79, the Commission found that the test to use in determining whether charges for tandem rate elements is appropriate is a two-prong test analyzing both geographic coverage and functionality.[60] The Commission found that AT&T had demonstrated that its switches serve a geographic area comparable to that covered by BellSouth's tandem switches.[61] However, the Commission also concluded that AT&T had not satisfied the second prong, or the functionality part, of the test.[62]

By its Petition, AT&T does not challenge the finding of the Commission that AT&T's switches serve a geographic area similar to that served by BellSouth's switches. However, AT&T does seek reconsideration or rehearing on (1) whether a functionality test is required and (2) even if a functionality test is required, whether AT&T established that its switches perform the same functions as BellSouth's tandem switches.[63]

Discussion:

In Order No. 2001-79, the Commission found "the test to use in determining whether charges for tandem rate elements [are] appropriate is a two-prong test analyzing both geographic coverage and functionality."[64] In reaching this decision, the Commission

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[60] Order No. 2001-79, p. 32.
[61] *Id.* at 34.
[62] *Id.*
[63] Petition of AT&T, pp.24-25.
[64] Order No. 2001-79, p. 32.

analyzed FCC Rule 47 C.F.R. §51.711(a), the FCC's *Local Competition Order*,[65] and relevant case law.

By its Petition, AT&T alleges that the Commission misinterpreted the FCC regulations. According to AT&T, the FCC regulations require only a geographic test to determine whether a CLEC should receive the tandem switch rate for its switches.[66] AT&T asserts that the functionality test "provides an alternative way in which CLECs can qualify for the tandem rate."[67]

As stated in Order No. 2001-79, "AT&T's position is based on a narrow reading of the language of a portion of FCC Rule 47 C.F.R. §51.711(a)."[68] The Commission also recognized in Order No. 2001-79 that "[t]o read ¶ 1090 of the *Local Competition Order* as only advancing the geographic test ignores the instructions of the FCC. Paragraph 1090 of the *Local Competition Order* provides

> 1090. We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude states may establish transport and termination rates in the arbitration process that vary according to whether traffic is routed through a tandem switch or directly to an end-office switch. In such event, states shall also consider whether new technologies (*e.g.*, fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of

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[65] First Report and Order, FCC 96-325, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98) and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers (CC Docket No. 95-185) (rel. August 8, 1996) (referred to as "*Local Competition Order*").
[66] Petition of AT&T, p. 25.
[67] Petition of AT&T, p. 26.
[68] Order No. 2001-79, p. 30.

> transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.
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> *Local Competition Order*, ¶ 1090.

In support of its argument that the Commission misinterpreted the FCC regulations, AT&T cites to federal cases and to decisions of other state commissions. First, AT&T cites the case of *US West Communications, Inc. v. Minnesota Public Utilities Commission,* 55 F. Supp.2d 968 (D. Minn. 1999). In this case, US West sought judicial review of determinations made by the Minnesota PUC regarding an interconnection agreement between US West and AT&T Wireless Services, Inc. ("AWS") a Commercial Mobile Radio Service ("CMRS"). Upon reviewing the state commission's finding that AWS met a geographic comparability test and similar functionality test, the federal district court stated "[t]he evidence also indicates that the [switch] covers a geographic area comparable to that covered by a tandem switch. Pursuant to FCC rules, this alone provides sufficient grounds for a finding that the appropriate rate … is the tandem switch rate."[69]

AT&T also cites the case of *US West Communications, Inc. v. Public Service Commission of Utah*, 75 F.Supp.2d 1284 (D.Utah 1999) for the proposition that only a geographic test is applicable. However, in this case the federal district court noted that the Utah PSC required US West to compensate the services of the CMRS provider at the

[69] *US West v. Minn. PUC,* 55 F. Supp.2d at 979 (D.Minn. 1999).

tandem rate after the Utah PSC concluded that the CMRS provider's switches performed comparable functions and serve a larger geographic area. In rejecting US West's challenge to the Utah PSC's decision, the federal district court stated "[a]t least one court has agreed with U.S. West that a geographic analysis alone is an insufficient basis upon which to uphold a rate determination and that 'the rate for a wireless switch should be determined by whether it functions like a tandem switch, and geography should be considered. This Court agrees."[70](Internal citation omitted.)

In Order No. 2001-79, this Commission cited to the cases of *MCI Telecommunications Corp. v. Illinois Bell Telephone*, 1999 U.S. Dist. LEXIS 11418 (N.D. Ill, June 22, 1999) and *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999) as authority for use of the two prong test of geographic coverage and functionality. Clearly, there exists sufficient case law to support the Commission's determination that the two-prong test is the appropriate test to use.

AT&T also asserts error by the Commission for failing to consider decisions requiring only a geographic test rendered by the North Carolina Utilities Commission, the Kentucky Public Service Commission, and the Indiana Utility Regulatory Commission. As stated above, decisions by other state regulatory commissions have no preclusive or precedential value. Decisions by other state commissions may provide guidance to this Commission but those decisions have no binding or precedential effect on the decisions of this Commission. Further, it is just as clear that other state commissions have determined it appropriate to use the two-prong test analyzing both geographic coverage

[70] *US West v. Utah PSC,* 75 F. Supp. 2d at 1290.

and functionality. Clearly, the decisions of the state commissions in the *US West Communications, Inc. v. Public Service Commission of Utah* case, the *MCI Telecommunications Corp. v. Illinois Bell Telephone* case, and the *US West Communications v. MFS Intelenet, Inc.* case utilized a the two-prong test.

The Commission finds that ¶ 1090 of the *Local Competition Order* provides for a two-prong test. The FCC in ¶ 1090 of the *Local Competition Order* analyzed first the "function" part of the test. The FCC expressly recognized that "additional costs" are incurred by a LEC in transporting and terminating a call originating on a competitor's network. Further, the FCC recognized that transport and termination rates would vary depending on whether calls are routed through a tandem switch or routed directly to an end-office switch. The FCC then instructs the state commissions to consider new technologies in a competitor's network and whether those technologies perform functions similar to functions performed by the incumbent LEC's tandem switch. Finally, the FCC states that where the competitor's switch serves a geographic area comparable to the area served by the incumbent LEC's tandem, then the appropriate rate for the interconnecting carrier's additional costs are the tandem interconnection rates. Thus ¶ 1090 of the *Local Competition Order* provides that state commission consider the functions performed by a competitor's switch and then consider whether the competitor's switch covers a comparable geographic area.

47 C.F.R. § 51.711 tracks the reasoning set forth in ¶ 1090 of the *Local Competition Order*. 47 C.F.R. § 51.711(a)(1) provides for the function part of the test when it states that "symmetrical rates are rates that a carrier other than an incumbent

LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assess upon the other carrier for the same services." (emphasis added). Then 47 C.F.R.§ 51.711(a)(3) provides for the geographic part of the test in providing "[w]here the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

To read ¶ 1090 of the *Local Competition Order* as not providing for the "function" part of the test completely ignores the recognition of the FCC that costs vary depending on whether tandem switching is involved. Further, to read FCC rule § 51.711(a)(3) without considering § 51.711(a)(1) completely ignores the rational of the FCC expressed in the *Local Competition Order*. The only logical conclusion to draw from ¶ 1090 of the *Local Competition Order* and 47 C.F.R. 51.711(a) is that a two-prong test is applicable. This conclusion is supported by case law. Further, to only consider geographic coverage without considering the functions performed would provide compensation for functions not performed and costs not incurred. Therefore, the Commission believes its decision to use the two-prong test analyzing both geographic coverage and functionality is supported by both the FCC rules and order and case law.

Next AT&T alleges error by the Commission in finding that AT&T's switches do not provide functions similar to BellSouth's tandem switches. AT&T asserts that even under the functionality test its switches perform many tandem functions, such as acting as access tandems routing interLATA traffic. AT&T also asserts that direct trunking has

been established to permit completion of calls across the LATA or across the state solely on AT&T's network for traffic between AT&T customers and that direct trunking to each BellSouth tandem has been established for traffic between AT&T and BellSouth customers.[71]

As this Commission noted in Order No. 2001-79, the FCC's rule defines "local tandem switching capability" as including "trunk connect facilities," the basic switch trunk function of connecting trunks and the functions that are centralized in tandem switches, including but not limited to call recording, routing calls to operator services and signaling conversion features. 47 C.F.R. § 51.319(c)(3). Thus AT&T's switches must connect trunks terminated in one end office switch to trunks terminated in another end office switch. Regardless of AT&T's assertions, AT&T's switches in South Carolina do not connect local traffic in such a manner. Therefore, AT&T's switches cannot function as tandem switches.

Accordingly, the Commission finds no reason to disturb its conclusions from Order No. 2001-97 on this issue, and the Commission denies AT&T's Petition with respect to this issue.

II. BELLSOUTH'S MOTION FOR RECONSIDERATION AND/OR REHEARING

Issue 6: Under what rates, terms, and conditions may AT&T purchase network elements or combinations to replace service currently purchased from BellSouth tariffs?

[71] It is interesting to note that during questioning at the arbitration hearing, AT&T witness Follensbee admitted that AT&T has not identified its switches as tandem switches in the Local Exchange Routing Guide.

With regard to Issue 6, the only point of disagreement between AT&T and BellSouth which the Commission was asked to decide concerned the application of termination liability charges when existing services being provided to AT&T under term and volume contracts are converted to unbundled network elements ("UNEs"). In Order No. 2001-79, the Commission held "that AT&T should not be subject to termination penalties for converting special access purchased under tariffed services pursuant to contract to network elements."[72]

BellSouth alleges error by the Commission in this ruling and asserts

(1) that the Commission's ruling impermissibly impaired and altered the contractual obligations of AT&T and BellSouth in violation of the Contract Clauses of both the federal and state constitutions;
(2) that the ruling of the Commission contradicts the FCC's Order determining that termination liability should apply when converting from special access to UNE combinations; and
(3) that the Commission's ruling discriminates against two other classes of customers in South Carolina.

Motion of BellSouth, pp. 3-4.

Discussion:

With regard to BellSouth's assertion that the Commission's ruling violates the Contract clauses of both the United States and South Carolina Constitutions, the Commission properly noted that the right to contract is not absolute. This issue was adequately discussed in Order No. 2001-79, and there is no reason to revisit this point under BellSouth's Motion.

[72] Order No. 2001-79, p. 16.

BellSouth also reasserts that the Commission's ruling discriminates against two other classes of customers in South Carolina. BellSouth asserts that the Commission's decision discriminates against those customers who have term and volume contracts who will have to pay termination liabilities if they terminate their contracts early or do not meet the volume commitments. Additionally, BellSouth asserts that the Commission's decision discriminates against those customers who entered month-to-month contracts to avoid the possibility of paying termination penalties.

In Order No. 2001-79 the Commission considered that at the time AT&T entered into the contracts at issue, that BellSouth refused, pursuant to directive from this Commission, to provision loop/transport combinations. In January 1999, the United States Supreme Court decision of *AT&T Corporation, et al. v. Iowa Utilities Board, et al.*[73] was issued upholding the FCC's rules and order requiring ILECS to provide combinations of network elements. However, until the January 1999 decision of the U.S. Supreme Court, the choices for obtaining these network elements and combinations were improperly limited. Thus the Commission found that AT&T should not be penalized for converting special access service to unbundled network elements under termination liability clauses contained in contracts entered when provisioning of such unbundled network elements and combinations were improperly limited. The Commission's decision only considered this issue in the narrow context under the specific facts presented; namely where the CLEC was improperly denied the provisioning of services that it sought. Thus this narrow ruling does not discriminate against the classes of customers listed by BellSouth.

[73] 525 U.S. 366, 119 S.Ct. 721 (1999).

In a new argument on this issue, BellSouth asserts that the FCC has made a determination on this point. BellSouth argues that the Commission's ruling contradicts the FCC's Order determining that termination liability should apply when converting from special access to UNE combinations.[74] BellSouth asserts that the FCC "anticipated" this specific issue and stated in its Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, "that any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties required under volume or term contracts."[75]

The language relied upon by BellSouth is taken from a footnote of the FCC's Order. The test of the FCC's decision to which the footnote relates reads as follows:

> 486. As an initial matter, under existing law, a requesting carrier is entitled to obtain combinations of loop and transport between the end user and the incumbent LECs serving wire center on an unrestricted basis at unbundled network element prices. In particular, any requesting carrier that is collocated in a serving wire center is free to order loops and transport to that serving wire center as unbundled network elements because those elements meet the unbundling standard, as discussed above. Moreover, to the extent those unbundled network elements are already combined as a special access circuit, the incumbent may not separate them under rule 51.315(b), which was reinstated by the Supreme Court. In such situations, it would be impermissible for an incumbent LEC to require that a requesting carrier provide a certain amount of local service over such facilities.
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> FCC 99-238, ¶ 486.

[74] Motion of BellSouth, p. 3.
[75] Third Report and Order and Fourth Notice of Proposed Rulemaking, FCC 99-238, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket N0. 96-98 (November 5, 1999).

It is clear to this Commission that the footnote quoted by BellSouth, when taken in context, was intended to apply in circumstances where the CLEC had a clear choice between special access and UNE combinations, chose special access, and later converted to UNEs. The paragraph begins by stating the law as it currently existed. The FCC assumed that the incumbent LECs were providing UNE combinations at cost-based rates and thus complying with existing law when this paragraph and footnote were written.

However, as noted in Order No. 2001-79, this was not the situation before the Commission. The record of the arbitration shows that BellSouth was not providing AT&T with the UNE combinations when the contract was entered. Thus AT&T entered into a contract for special access services with BellSouth because AT&T could not get the UNE combinations it was entitled to purchase under the law. In the absence of the availability of UNE combinations at cost-based rates, the Commission finds that the footnote asserted by BellSouth does not apply to the circumstances in existence in South Carolina at the time the contract was entered.

Accordingly, the commission finds the grounds asserted by BellSouth in its Motion without merit and hereby denies BellSouth's Motion.

CONCLUSION

Therefore based upon the reasoning as set forth above,

IT IS THEREFORE ORDERED THAT:

1. AT&T's Petition for Rehearing or Reconsideration is denied.

2. BellSouth's Motion for Reconsideration and/or Rehearing is denied.

3. This Order shall remain in full force and effect until further Order of this Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)

COMMISSIONERS BRADLEY AND CLYBURN, DISSENTING:

We respectfully dissent from the majority opinion as concerns Issue 7 in the matters arbitrated by us. One of the purposes of the Telecommunications Act of 1996 (the Act) is to promote competition in the local telecommunications markets. It is the States' responsibility to aid in this process through the application of the Act, the regulations of the Federal Communications Commission (FCC), and other applicable law. It is our belief that parts of the Act disadvantaged the incumbent local exchange carriers (ILECs) in order to promote vigorous competition, however, we believe that the provisions of the Act must be enforced.

Having made these statements, we believe that the majority erred in its interpretation of 47 CFR 51.703(b) and Paragraph 1062 of the FCC's Local Competition Order, and failed to properly assess the FCC's SBC Kansas/Oklahoma Order. The Act allows a competitive local exchange carrier (CLEC) to designate its own calling areas, and this Commission has in the past approved calling areas that include entire local access and transport areas (LATAs). We would hold that the applicable law allows a CLEC to have a single point of interconnection (POI) in a LATA or designated local calling area. The SBC Kansas/Oklahoma order further defines this position as upheld by the FCC in the TRS Wireless decision.

We would hold that under 47 CFR 51.703(b), a local exchange carrier (LEC) may not charge other telecommunications carriers for local traffic, and that the scenario before the Commission represents local traffic. Further, FCC Regulations and the Act prohibit the shifting of costs of transporting an incumbent LEC's own traffic. In addition, Paragraph 1062 of the Local Competition Order clearly prohibits the shifting of costs to

the other party. The paragraph states as follows: "The interconnecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the interconnecting carrier." Further, competing carriers can choose the most efficient points to exchange traffic with the ILEC. This has the effect of lowering costs to promote competition, and prevents ILECs from increasing costs by redefining numerous points. See 47 USC 251(c)(2) on interconnection. Accordingly, we would hold that BellSouth should not be compensated by AT&T for transport from a BellSouth end office to a remote BellSouth tandem switch and AT&T POI. Each party should bear its own costs in such a transaction. Thus, in the example given, BellSouth should not be compensated by AT&T for transport from its end office in Orangeburg to the BellSouth tandem switch and AT&T POI in Columbia. We believe that each company paying its own costs in this situation promotes competition in the local telecommunications industry as intended by the Telecommunications Act of 1996.

Philip T. Bradley, Commissioner

Mignon L. Clyburn, Commissioner